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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. _____

THOMAS R. FADELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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QUESTIONS PRESENTED

1. Can a federal prosecutor suppress Jencks Act hand-written notes of witness interviews when a claim is made that the notes are Brady material and the suppression was deliberate to prevent their use by the defense at trial?

2. Can a trial court decide whether suppressed Jencks Act and Brady material would be useful to the defense?

3. Are hand-written notes and interviews of government witnesses by federal agents and Special Agent Reports (S.A.R.) producible under the Jencks Act?

4. Can a Rule 33 hearing be considered impartial, thorough and fair where the hearing judge cuts short the hearing before Petitioner could present his evidence and then makes material "findings", (a) that the government later admits are false,

(b) which the record shows to be false and are wholly unsupported by the evidence, (c) by arbitrarily ignoring an unrefuted verified Offer to Prove, (d) by arbitrarily ignoring Rule 33 evidence that corroborates Petitioner, (3) from matters outside the record and (f) which cover-up prosecutorial fraud and abuse?

5. Was the wrong test used by the lower court and appellate court in weighing the recantation of a major government witness who implicated the federal prosecutors in fabrication of evidence and the knowing use of false testimony?

6. Was Petitioner denied the continuing availability of a mechanism for relief, post trial, and to a full and fair consideration of his constitutional rights by a terminally ill trial judge who was intemperant, intolerant, and prejudiced against Petitioner, and who terminated a Rule 33 hearing before Petitioner could call the chief and, at times, sole

government witness who would have recanted his material trial testimony and implicated the federal agents in fraud and corruption of the judicial process?

7. Can a Court of Appeals Court affirm a lower court's apparent finding that hand-written Jencks Act material was delivered to defendant at trial when the trial prosecutor admitted in The Court of Appeals in Cause 80-8020[1/] as well as at the Rule 33 hearing below that the hand-written notes were not delivered, and said hand-written notes were compelling Brady material that proved Petitioner's innocence and implicated the federal agents in fraud and corruption of the judicial process?

8. Can a Court of Appeals affirm a Rule 33 lower court finding that only the Petitioner

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1/ The government in a Response to Motion for Interim Release in the 7th Circuit Court of Appeals after the Rule 33 hearing on p. 2, paragraph 2 admitted that hand-written notes were withheld. The Response was dated April 15, 1980, and the trial judge was unaware of the admission contained therein. See Fadell v. U.S. Cause No. 80-8020, 7th Cir. U.S.C.A.

claimed Sec. 3500 material was suppressed at trial when Petitioner's trial attorney by testimony and affidavit placed of record below corroborated Petitioner's claim, and the trial federal prosecutor admitted in the Appeals Court that hand-written notes of witness interviews, (which included considerable Brady material) were withheld, and neither federal trial prosecutor could testify that all the Sec. 3500 material was in fact made available to the defense for trial?

9. Can a Court of Appeals ignore, as the lower court ignored, the verified Offer to Prove filed by the Petitioner when the trial court cut short the Rule 33 hearing, which Offer to Prove is unrefuted and must be weighed as true for purposes of the Rule 33 hearing; and which includes, inter alia, the recantation of the chief government witness, John Svaco, and other trial witnesses, and the lack of a jurisdictionally required federal investigation?

10. Can a Court of Appeals affirm a Rule 33 finding that Petitioner failed to present an exculpatory polygraph test at trial when the trial court refused to allow Petitioner to present an exculpatory polygraph test into evidence that he had taken prior to trial? In addition can a trial judge, without examining the polygraph test and results, find that a polygraph test would not have affected the jury results?

11. Can a Court of Appeals affirm a Rule 33 order that ignored the massive amount of suppressed Jencks Act material and Brady material that was produced by the government an hour before the Rule 33 hearing was cut short by the trial judge, and whose Brady contents became known to Petitioner only after the Rule 33 hearing ended, and was unknown to or ignored by the trial judge, and who ignored his own ruling to produce all non-grand jury Sec. 3500 (Jencks Act) material when the prosecutors admitted that Sec. 3500

material was missing and had not been produced at the Rule 33 hearing, but possibly could be located?

12. Can the Court of Appeals by affirming the Rule 33 Order of the lower court, place Petitioner in the position of attacking his conviction on the grounds his trial attorney failed to use the Brady material proving innocence found in the Sec. 3500 material produced by the government for the first time at the Rule 33 hearing, when both Petitioner and his attorney knew and have stated under oath that said Brady material and Sec. 3500 material was not produced at trial. In other words, the result of an affirmance will be to make a charade of the judicial and appellate process by setting up new fictitious facts that would make trial counsel completely imcompetent, and give defendant grounds to claim incompetence of counsel.

13. Can this Court affirm an order of a trial judge that covers-up prosecutorial fraud and misconduct apparently to protect the appearance of justice; and to do so has to arrive at irrational conclusions, find fictitious "facts", and ignore probative and compelling evidence?

14. Does the Brady doctrine, and its progeny, require post-trial, a continuing duty to disclose information or evidence which would create a reasonable doubt of guilt that did not otherwise exist?

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Opinions Below

The unpublished opinion of the Court of Appeals is reproduced as Appendix A, which incorporates the opinion rendered by the late trial judge of the district court in its entirety.

Jurisdiction

The Petitioner seeks a review of the denial of his motion for new trial brought pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The Order of the Court of Appeals affirming the judgment of the district court was entered on November 18, 1982. The Petitioner, having been granted additional time to file, filed a timely Combined Petition for Re-hearing in Banc and for Rehearing, which was denied on April 1, 1983 in Cause No. 80-2147. This Petition is being filed within 60 days of said date pursuant to Rule 20. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254(1).

Constitutional Provisions and Statutes Involved

This case involves Petitioner's right to a fair trial, the right to effective

assistance of counsel, and the right to confrontation of witnesses guaranteed by the 6th Amendment to the U.S. Constitution, and to due process of law guaranteed by the 5th Amendment to the U.S. Constitution. It further involves his statutory rights under Title 18 U.S.C. Sec. 3500, and his rights under Rule 33, Federal Rules of Criminal Procedure. The texts of the aforesaid are set forth in the Appendix hereto.

Statement of the Case

Petitioner was indicted in the U.S. District Court, Northern District of Indiana, Hammond Division, Honorable Phil McNagny, Jr. presiding in Cause No. 77-59 on 16 counts of obstruction of justice and false declaration on August 4, 1977. Petitioner entered a plea of not guilty, and testified in his own behalf. The government dismissed one count after the jury was empaneled, and the court dismissed 5 more counts during trial. On December 8, 1977 Petitioner was convicted

by a jury of 5 counts of obstruction of justice, and 2 counts of false declaration. The court granted a new trial on one count of false declaration. On February 3, 1978 Petitioner was sentenced to a three year adult term and was fined $25,000. Petitioner appealed. Petitioner took a polygraph test on March 13, 1978 at John Reid & Associates, Chicago, Illinois, which proved he was not guilty of the false declaration count and 4 of the 5 obstruction of justice counts, and was inconclusive as to the remaining obstruction of justice count. The following questions were asked of Petitioner, answered with a simple "No", and the polygraph expert concluded the answers were truthful:

> "(1) On May 26, 1977, was there anything known to you in the Assessors office to be called a control card?
>
> Answer: No.
>
> (2) During January of 1977, did you attempt to prevent Bart Kusmierz or Helen Kraves from

conveying any information to federal investigators?

Answer: No.

It is the opinion of the examiner, based on this subject's polygraph records, that he is telling the truth on the above-listed questions."

John E. Reid & Associates
report dated March 15, 1978,
Chicago, Illinois

As a result of the polygraph text Counts III, IV (obstruction of justice) and XIV (perjury) fail directly, and Counts XIII and XV fail by implication. The 7th Circuit affirmed the conviction in Appellate Cause No. 78-1105 on June 4, 1979. Petition for Certiorari in No. 79-140 was denied on October 15, 1979. On or about August 7, 1979 Petitioner filed below a Rule 33 Motion for New Trial on the Grounds of Newly Discovered Evidence, F.R. CR.P., which is the basis for federal jurisdiction in the lower court.

While the original appeal was pending in the 7th Circuit Court of Appeals in 1978

Petitioner learned that Millard Trivanovich allegedly went to the F.B.I. office in Los Angeles, California in the summer of 1978 and admitted he lied at the original trial. Petitioner's counsel wrote in December, 1978, to the then U.S. Attorney to inquire if Trivanovich had recanted his trial testimony. No reply was ever made by the U.S. Attorney, who chose to cover-up Trivanovich's recantation of all of his material trial testimony, without notifying the Court or the Petitioner. Trivanovich recanted because his "conscience was bothering him". The recantations of Trivanovich before the I.R.S. in California, and federal agents in Indiana, and his subsequent grand jury recantations, although clearly Brady material, have never been produced for Petitioner's examination, and thereby constitute a continuing denial of due process of law

and of his constitutional rights. Why a federal judge would cooperate in suppressing Brady material baffles the Petitioner. The missing Jencks Act material, hereinafter discussed, would also prove to be Brady material establishing that Petitioner testified truthfully and would implicate the federal agents in fraud, misconduct, and corruption of the judicial process. Trivanovich later testified at the Rule 33 hearing below that his trial perjury was, in part, fabricated by the Assistant U.S. Attorney, and, inferred that his lawyer, working closely with the federal agents, on their behalf, talked him into testifying falsely. The Petitioner at the original trial, taken by surprise and not able to meet Trivanovich's perjury, simply testified that Trivanovich was lying and that the over-zealous federal agents had put words in Trivanovich's mouth, and consistently maintained this judgment thereafter. Trivanovich, who was

Petitioner's Chief Deputy and had been demoted was paraded on at trial as the final government witness, and then used again as the chief rebuttal witness. At the Rule 33 hearing the trial Assistant U.S. Attorney admitted that two other government witnesses had told him pre-trial they could not testify that Petitioner had ever used or heard the terminology "control cards" to describe certain business record books. This Brady material was suppressed and never conveyed to the Petitioner for his use. These two witnesses were then used, along with Trivanovich, to create false inferences that Petitioner knew about the terminology "control cards". A government witness named Krevitz also informed the federal agents he knew nothing as a "control card" in his 15 years in the Assessor's office. This Brady material was like-wise suppressed.

Svaco, the only witness who directly testified he used the terminology "control

cards" with Petitioner, [2/] has and would have recanted his trial testimony as to "control cards" had the trial judge not prevented him from testifying at the Rule 33 hearing. See Offer to Prove. There are now no witnesses to be found who would testify for the government that Petitioner committed perjury when he testified before a grand jury he knew nothing as a "control card". For the judge below to find that even without Trivanovich's testimony, "there was easily sufficient testimony to establish that the records in question were in fact commonly called (control cards) by the (Petitioner)" is false and prejudicially dishonest. Not even Svaco testified the Petitioner "commonly called" the records "control cards". Such vicious

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2/ Tape recordings of certain conversations put in evidence at trial clearly showed Svaco to be committing perjury when he testified he and Petitioner discussed "control cards" at these conversations.

dishonesty and memoralization of a fabrication by a federal judge is wicked, insidious, and cruel. Krevitz also at a post-trial deposition admitted he unwittingly testified falsely at trial to the time period in which he talked with Petitioner, which was the sole "evidence" by inference used by the trial court in allowing three (3) counts to reach the jury.

Helen Kravas, post trial, under oath, admitted she had unintentionally testified falsely as to material matters. John Svaco, the chief government witness, and the sole witness on most counts, on two occasions admitted to Petitioner, post-trial, that he was pressured into testifying falsely as to "control cards" and other material matters by federal agents. The now deceased trial judge cut short the Rule 33 hearing before Svaco could be called and used as a witness by Petitioner, although the judge at

the hearing said to question Svaco about the alleged non-existent federal investigation, then prevented Petitioner from questioning Svaco. In 1978 during the appeal the Petitioner maintained that no grand jury Sec. 3500 material was "furnished the Petitioner by the government for any of the chief or principal witnesses, to-wit: Svaco, Gligor, Kravas, Kusmirz, Krevitz, Carter, Nauta, Trivanovich, Covey, Ivancevich, Mike Paulson, etc." App. Brief, p. 60. Petitioner said "It can only be concluded that there persons did not testify before the grand jury." App. Br. p. 60, and the "Witnesses who did testify (Dixon, Edmond, Parks, Allen, Brubar) did not implicate Mr. Fadell in any of the alleged offenses in the Indictment . . . App. Br. p. 60. "Mr. Frank Kaffenberger and John Sadowski, the I.R.S. case agents investigating Mr. Fadell testified at the trial but No. Sec. 3500 material was turned over to the Petitioner, leading to the conclusion that they did not testify before the grand

jury". App. Br. p. 51, Petitioner said also" . . . there remains a deep suspicion that other 3500 material was not produced as required". App. Br. pp. 85, 86. ". . . Mr. Fadell said he believed other 3500 material was withheld (e.g. Trivanovich, Prettyman, etc." App. Br. p. 84. "no 3500 material for an interview of Svaco was produced at trial herein for any months October 1976-April 1977, inclusive". App. Br. pp. 84, 85. The government in its Brief did not dispute the allegations in the appellant's Brief as to what was not produced.

The lower court had ordered all Brady material furnished to Petitioner prior to trial. At the Rule 33 hearing the trial judge ruled that the government had agreed pre-trial with Petitioner's attorney that all Sec. 3500 (Jencks Act) material would be produced, and he ordered all the non-grand jury 3500 material produced the next morning for Petitioner's examination. The government did not comply

completely with the order claiming much of the material had been "cannibalized" and was missing. One federal agent thought the missing material could be found. It was never produced, nor did the judge order that it be searched for. Petitioner has a pending motion seeking a new court order that the government comply with the original order to produce all the non-grand jury Jencks Act material. At the hearing the government admitted the grand jury Jencks Act material for I.R.S. agent Kaffenberger had not been produced. The judge refused to order it produced at the rule 33 hearing. The non-grand jury material that was produced on the morning the judge cut short the Rule 33 hearing was examined after the hearing by Petitioner and his trial counsel. It became apparent that over 200 pages of the produced Jencks Act Material had been suppressed at trial by the government. More significant was the Jencks Act material was replete with

Brady material establishing Petitioner's innocence or impeaching the credibility of government witnesses. The Rule 33 judge was unaware of the Brady material found in the Jencks Act material after the hearing, or chose to ignore it. The Brady significance of the produced Jencks Act material not produced at trial is two-fold. First it corroborates Petitioner's and his trial attorney's testimony that hundreds of pages of the Jencks Act material was suppressed -- as no use of the Brady material found in the Jencks Act material or the Jencks Act material, itself, was ever made at the trial. To argue that Petitioner and his trial counsel had this material and failed to use it is dishonest and stupid, which is essentially what the trial judge would have this Court believe. Secondly, the Brady material proves, and corroborates Petitioner's contention, that the federal agents deliberately

perpetrated a fraud on the trial court and Petitioner, denying him a fair trial, the effective assistance of counsel, and due process of law. The government admitted post-hearing in a Response to Petitioner's Petition for Interim Release in the 7th Circuit Court of Appeals, App. Cause No.. 80-8020 about April 25, 1980 that the 170 pages of hand-written notes found in the Jencks Act material, which included a massive amount of Brady material, were not produced at the trial. With the lack of effective discovery in a federal criminal case, Petitioner being denied the Brady and Jencks Act material and other forms of discovery, was bush-wacked at trial by men who corrupted and perverted the judicial system for their own evil end, and found a trial judge, post-trial, terminally ill and who lacked the moral courage and physical strength to rail against this foul conduct; if, in fact, he

could comprehend the over-whelming dimensions or significance of the fraud perpetrated in his Court.

The district court set an evidentiary hearing on the Rule 33 Motion initially on November 2, 1979, and then continued it to March 28, 1980. On March 28, without prior notice, the court indicated that only one day was alloted for the hearing. Petitioner objected to the truncated hearing, but to no avail. One-half the first day of hearing was wasted by the government's refusal to answer questions and dilatory tactics. At the end of the first day the court indicated that two and one-half more hours would be granted on the Monday next (1½ hours for the government, and 1 hour for the Petitioner), after ordering the government to produce the non-grand jury Sec. 3500 material still intact for petitioner's inspection. The government had admitted that the 3500 material had been "cannibalized", and that much of it was

missing, and that the Sec. 3500 grand jury testimony of the I.R.S. agent that testified at trial and who had appeared four (4) times before the grand jury and testified to things generally related to his trial testimony had not been produced at trial. The Court refused the Petitioner the right to inspect the Sec. 3500 grand jury material that supposedly had been produced at trial, but said it would inspect the same in camera. No Special Agent Reports (S.A.R.) were produced as 3500 material at trial. The court found that the government had entered into an agreement pre-trial with the defense to produce all Sec. 3500 material, and said it was bound by the agreement. Pre-trial the Court had ordered all Brady material be turned over to Petitioner.

The unrefuted verified Rule 33 Motions, the hearing evidence, the unrefuted verified Offer to Prove, the Affidavit of defense

counsel Martin Kinney, and the government's admission post-hearing that over 180 pages of Jencks Act hand-written witness interviews were suppressed at trial established the following:

1. The chief government witness and sole witness at times, John Svaco, recanted his material trial testimony. Here the government's case depended almost entirely on Svaco's testimony. Without it there could have been no fair indictment and no evidence to carry the case to the jury.

2. The second chief government witness, Millard Trivanovich, recanted all of his material trial testimony, and implicated the federal prosecutors in the fabrication of trial evidence.

3. Two government witnesses, Dave Krevitz and Helen Kravas admitted they had testified at trial erroneously as to material facts.

4. A government witness, Dan Gligor, changed his material trial testimony post-trial.

5. That three government witnesses, John Irak, Ted Prettyman, and Trivanovich had admitted to the prosecutors pre-trial that they never knew Petitioner to know certain records in the Assessor's office as "control cards", and this Brady material was suppressed by the government agents. That thereafter the federal prosecutors at trial knowingly used Irak, Prettyman and Trivanovich to create the false inference that Petitioner knew certain records as "control cards", in order to convict him of perjury.

6. That the government admitted at the Rule 33 hearing that none of the grand jury Jencks Act material for I.R.S. agent, Frank Kaffenberger, was produced.

7. Post-hearing the government admitted in the Court of Appeals that over 180 pages

of Jencks Act hand-written notes of witness interviews were suppressed at trial. The Rule 33 hearing judge was unaware of this admission, and erroneously found in his order that the hand-written notes were delivered for trial. The Court of Appeals adopted this error, ignoring the government's post-hearing admission.

8. That certain typed Jencks Act material was suppressed at trial for many government witnesses, including Svaco.

9. That the suppressed hand-written notes and typed Jencks Act material was vital, undisclosed Brady material which was deliberately concealed by the federal prosecutors. That the Rule 33 hearing judge was unaware of the Brady nature of this material.

10. That the government created a false jurisdictional inference that an active federal investigation was taking place for a certain period in 1976 and 1977, when, in

fact, no investigation was taking place.

11. That an assistant U.S. Attorney fabricated crucial testimony at trial of the chief government rebuttal witness, Millard Trivanovich.

12. That the federal prosecutors knowingly used false and perjured testimony at the trial, and failed to correct false and perjured testimony when it came to their attention.

13. All Special Agent Reports (S.A.R.'s) were suppressed at trial. The Brady nature of the suppressed hand-written notes of witness interviews came to the attention of the Petitioner after the Rule 33 hearing was over, and, in fact, was not known or considered by the Rule 33 judge, although the 7th Circuit Court of Appeals was clearly made aware of the Brady nature of the suppressed notes. Likewise only the 7th Circuit was aware of the alterations,

deletions and fabrications found in the type-written memorandums of the suppressed hand-written interviews. Exculpatory matters were deleted, and incriminatory fabrications added, by the government agents when typing up the interviews. (It should be noted that several hundred pages of hand-written interviews are still missing, after being suppressed at trial.) The 7th Circuit chose to ignore, without comment, the said Brady material and the fraudulent changing of the original witness interviews.

14. Trial defense counsel, Martin Kinney, by affidavit contradicts the lower court's finding that he was offered one of Kaffenberger's grand jury Jencks Act testimony at trial and refused to take it or that he waived his right to any 3500 material. **Appendix B**

Kinney's affidavit was made an Appendix to Petitioner's Rule 33 Appellate Brief.

Prior to ruling the Rule 33 trial judge, now deceased had developed a bias and prejudice against Petitioner, and had abused Petitioner at the Rule 33 hearing, which Petitioner stated in Pro se Petition for Writ of Mandamus to the 7th Circuit seeking to compel a ruling on his Rule 33 Motion, thereby undoubtedly further enraging the trial judge. Shortly thereafter the trial judge denied the Rule 33 Motion in what can fairly be described as a vicious, intemperant, insidious and intellectually dishonest Order. The 7th Circuit adopted the Order as its own, although the gross factual errors and misstatements of law therein were called to the 7th Circuit's attention in an Appellate Brief and Petition for Re-hearing. Petitioner served his sentence, and brings this Petition to correct a patent miscarriage of justice and to expose prosecutorial fraud that subverts constitutional rights and corrupts

the federal judicial system.

ARGUMENT

I.

The decision below conflicts with Mooney v. Holohan, 294 U.S. 103, 79 L Ed 791, 55 S. Ct. 430, 98 ALR 406, (1935) in that admittedly suppressed Jencks Act and Brady material demonstrated that the prosecutors fabricated the "crimes" involved and knowingly used perjured or false testimony.

The Rule 33 hearing judge, terminally ill, was not aware that the federal prosecutors in Response to a Motion for Interim Release pending in the 7th Circuit post trial, had admitted that over 180 pages of handwritten notes (Jencks Act material) of witness interviews produced at the end of the Rule 33 hearing were suppressed at trial.

In addition an undisclosed number are still missing and have never been produced. These hand-written notes contain a massive amount of Brady material proving Petitioner's innocence and implicating the federal prosecutors in the fabrication of "crimes" and the knowing use of perjured testimony. One Brady example is helpful in understanding what went on. The original hand-written notes of an I.R.S. interview with the chief government and sole witness at times, John Svaco, clearly shows he talked only about a potential State grand jury in a purported conversation with the Petitioner that became Count X, one of the "federal crimes" herein. Svaco said: "Tom told him to take the 5th if delivered a subpoena from the State". This is clearly not a federal offense. This hand-written note was suppressed at the trial, and substituted for it was a typewritten memorandum dated May 10th that

"Tom . . . told him if he got any type of subpoena . . . to take the 5th". It is clear that the I.R.S. agents deliberately changed Svaco's original story from the hand-written notes (state subpoenas) when typing up the May 10th Memo of Interview (any type of subpoena) so as to incriminate the Petitioner in a fabricated "crime". The Petitioner without having seen the suppressed hand-written notes testified at the original trial that the discussion with Svaco was about a potential State Grand Jury only. Marie Samar, who was present at the meeting but was unable to testify at the trial because of prosecutorial misconduct, corroborated the Petitioner's testimony, post-trial by affidavit. The prosecutors obviously had Svaco read the type-written memo months later and he knew how the government wanted him to testify -- that federal subpoenas were discussed. The 19 year I.R.S. agent,

Frank Kaffenberger, sitting at the government's counsel table the entire trial, who had interviewed Svaco, knowingly allowed this perjury to go uncorrected. At the Rule 33 hearing Kaffenberger unequivocally testified that Svaco did not discuss any federal Grand Jury subpoenas at the May 10th interview.

The suppressed hand-written notes are filled with similar circumstances involving prosecutorial misconduct. The example above involves facts where a federal "crime" was fabricated by the federal agents. It is not merely a situation where the jury might have had its judgment affected. Obviously under Holohan, and cases thereunder, that Petitioner's conviction must be set aside.[3/]

3/ It should be noted that this particular "crime" was one of three counts that shortly after the verdict, the trial judge felt compelled to state in open court that he had "grave misgivings" about these convictions, and that they "hung by the thinnest of threads".

II.

The decision below conflicts with Clancy v. United States, 365 U.S. 312, 5 L Ed 2d 574, 81 S. Ct. 645 (1961).

As indicated earlier the federal prosecutors after the Rule 33 hearing ended admitted that over 180 pages of Jencks Act hand-written notes were suppressed at the trial. The Rule 33 court ruled that an agreement had been reached before the original trial that the government would deliver all the Jencks act material before its witnesses testified. The judge in his Rule 33 order found I.R.S. agent, Frank Kaffenberger "extremely believable" that all Sec. 3500 material was produced against the "bald assertions of (Petitioner)" that grand jury Jencks Act material and other kinds of Jencks Act material were not produced. The government belatedly admitted that Kaffenberger did not tell the truth as to the suppressed Jencks Act hand-written notes. The judge

ignored Petitioner's trial counsel, Martin Kinney's Rule 33 affidavit that over 180 pages of Jencks Act material was not provided at the trial. 4/ In Petitioner's original Appeal Brief written in 1978 Petitioner claimed no grand jury Jencks Act material was furnished for any of the chief or principal witnesses. He said " . . . there remains a keep suspicion that other 3500 material was withheld, e.g. Trivanovich, Prettyman, etc.". At the rule 33 hearing neither government trial attorney was able to testify that all the Jencks Act material was produced. The government did admit that no Special Agent Reports (S.A.R.) were produced at the trial. The 7th Circuit holds that a special agent's report (S.A.R.) which an I.R.S. agent prepared in connection with the government's investigation . . . was a "statement within the meaning of the Jencks

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4/ See Appendix C

Act, and its denial was of constitutional proportions. Krilich v. U.S. 502 F 2d 680 (1974). This court in Clancy v. U.S. rejected the strict harmless error test in Sec. 3500 cases saying:

> "we put to one side Rosenberg v. U.S. where a failure to produce a document was considered harmless error under the particular circumstances of that case . . . Since the production of at least some of the statements withheld was a right of this defense, it is not for us to speculate whether they could have been utilized effectively." p. 577 (1 ed 2d)

The Clancy decision held that as the defendants had been denied an inspection of documents which were producible under the Jencks Act they were therefore entitled to a new trial. This case differs from Clancy in that the suppressed Jencks Act materal also contained a massive amount of Brady material.

III.

The decision below conflicts with the decision in Mesarosh v. U.S., 352 U.S. 1, 77 S.Ct. 1, 1 LED 2d 1 (1956) and Larrison v. U.S., 24 F. 2d 82 (7th Cir. 1928). The Rule 33 judge found that even striking Trivanovich's perjured testimony the Petitioner "failed to show that the evidence of Trivanovich's recantation would probably have led to an acquittal". Assuming, arguendo, that the government did not sponsor or was not aware of Trivanovich's perjury, the recantation testimony of Trivanovich must be weighed under the standard of Mesarosh v. U.S., supra, and U.S. v. Larrison, supra. The Trivanovich perjury must be weighed with the recantations of Svaco, Gligor, Kravas and Krevitz, and the proper test would be that without the perjury the jury "might" not have

convicted if Trivanovich and the others had testified truthfully. The court should further consider the impact of the fact of perjury on the jury's estimate of the credibility of the witnesses. U.S. v. Willis, D.C. Pa. 1979, 467 F. Supp. 1111, 112-1113, conviction vacated and indictment dismissed on motion of the United States C.A. 3d 1979, 606 F 2d 391. The recanted testimony in material matters of Trivanovich, Svaco, Krevitz and Kravas would now corroborate the trial testimony of the Petitioner and the polygraph test results of the Petitioner. A fair, disinterested unprejudiced judge would clearly find under the posture of the Rule 33 evidence the jury not only "might" but "probably would" not have convicted. Such a judge would also see that all the probative evidence on most counts disappeared with the recantations, and there would be no doubt that the recantations

with the exculpatory evidence found in the suppressed Jencks Act and Brady material would have prevented an honest indictment.

IV.

The appraisal of the Record by the Rule 33 judge below was not thorough and entirely reasonable, and involved gross error so as to deny Petitioner a full and fair fact hearing and an opportunity to support the allegations in his motion by evidence contrary to the decision of Machibroda v. U.S., 368 U.S. 487, 82 S. Ct. 510, 7 L. Ed2d 473 (1962). The judge below cut short the Rule 33 hearing before Petitioner could support the allegations of his Motion by calling numerous witnesses, including Svaco, and the I.R.S. agents and Assistant U.S. attorneys implicated in fraud and misconduct. The judge ignored

most of the probative evidence adduced at the Rule 33 hearing, e.g., the admissions by Hanning and Kaffenberger that showed no attempt was made to correct Svaco and Trivanovich's false testimony after they became aware of its falsity, that prejudicial false inferences were deliberately created by the government with the testimony of Irak, Krevitz, Kravas, Prettyman and Trivanovich, and that critical portions of Trivanovich's rebuttal testimony was fabricated by the government. The trial judge below failed to address the facts alleged in the Offer to Prove. The trial judge did not examine the polygraph test given by John Reid & Associates. The trial judge was unaware that after the Rule 33 hearing the federal prosecutors admitted that the hand-written notes of witness interviews were suppressed. The trial judge failed

to consider the affidavit of the trial defense attorney, Martin Kinney, that Sec. 3500 material was never produced. The trial judge never was aware of the Brady material found in the suppressed Sec. 3500 material after the hearing. The trial judge failed to consider that there was no federal investigation at the time involving certain counts, and that the prosecutors had misled the court and created false inferences about a federal investigation. The trial judge erred in refusing to order the suppressed grand jury Sec. 3500 material produced for examination by the defense. The trial judge erred in going outside the record on two occasions, to-wit:

(1) commenting that he knew "the facts leading up to" Trivanovich's recantation, and

(2) to erroneously find that the "defendant has also since been convicted of state charges arising out of the same events underlying his federal conviction".

This gratutious falsehood was obviously designed to prejudice Mr. Fadell's anticipated appeal, which it apparently did as the Court of Appeals reincorporated the falsehood in its Order.

The judge at the Rule 33 hearing abused and ridiculed Petitioner who was proceeding pro se with co-counsel. After the government wasted one-half the one day alloted for the Rule 33 hearing by refusing to answer questions and dilatory tactics, the judge refused a continuance. The judge shouted at and intimidated Millard Trivanovich, so as to deny Petitioner his full and effective use at the Rule 33 hearing; which shouting and ranting intimidated another defense witness, David Krevitz. The judge would not allow Petitioner to enter evidence of newly discovered prosecutorial misconduct. The

judge made no effort to have the admittedly missing Jencks Act material he had ordered produced searched for and produced post-hearing. The judge refused to order the government to produce all the grand jury Jencks Act material which Petitioner and his counsel claimed was never produced at trial. After stating 2½ years earlier in open court that he had "grave misgivings" as to 3 counts and they "hung by the thinnest of threads", the judge finds in his Rule 33 Order that "overwhelming evidence of defendant's guilt was adduced at trial". Such a finding indicates the bias and prejudice that the judge developed during the interim toward Petitioner and contradicts his earlier and fresher judgment, and underscores the insidious and intemperant tenor of his Rule 33 Order. The Rule 33 hearing and Order was not thorough or entirely reasonable.

V.

The decision below conflicts with Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L Ed 2d 215 (1963) U.S. v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L Ed 2d 342 (1976) Giglio v. U.S., 405 U.S. 150, 31 L Ed 2d 104, 92 S. Ct. 763 (1972), and Smith v. Phillips, 455 U.S. 209, 71 L Ed 2d 78, 102 S. Ct. 940 (1982).

The majority opinion in Smith v. Phillips citing Brady and Agurs stated that " . . . the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor". L. Ed 2d p. 87. In Agurs this Court said "If evidence highly probative of innocence is in (the prosecutor's) file, he should be presumed to recognize its significance". 427 U.S. at 110, 49 L. Ed 2d 342, 96 S. Ct. 2392. The

Court focuses on the materiality of suppressed evidence, not the culpability of the prosecutor, for due process purposes. In Smith the Court noted there was no evidence to suggest bad faith conduct by the prosecutors. Footnote 10, L. Ed 2d p. 88. The instant case has sufficient evidence overlooked, unknown or deliberately ignored by the Rule 33 judge and Court of Appeals, of prosecutorial fabrication of evidence, the knowing use of perjured testimony, and the fabrication of false inferences, to easily satisfy any fair prejudice requirement. Along with the recantation of the five witnesses there is no longer any evidence to support the government's case.

The lower court overlooked the written request in December, 1978 to the U.S. Attorney for Trivanovich's recantation Brady information. This material has never been made available to the

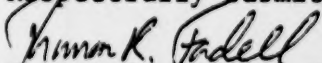
Petitioner. The admittedly missing Jencks Act material has never been made available for Petitioner's inspection or for the lower court's inspection. It undoubtedly contains a massive amount of evidence exculpating Petitioner and implicating the prosecutors in fraud on the Court. The produced Jencks Act material that had been suppressed at trial clearly shows that the federal agents initially knew no crimes were committed by Petitioner, and were compelled to fabricate evidence and knowingly use false evidence to convict an innocent man. The bottom line is that hundreds of pages of Brady material and information that was suppressed at trial was not negligently overlooked. It was suppressed because the over-zealous prosecutor could not produce it without conceding they had no case. There would have been no

evidence to carry the case to the jury. If post-conviction remedies are more than a charade, the Petitioner having easily met the strict tests above-described, a new trial must be granted herein.[5/]

Conclusion

For all the foregoing reasons, and in the interest of belated justice, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



Thomas R. Fadell, Pro se
Petitioner
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5/ Petitioner would call to the attention of the Court that failure to weigh prosecutorial mis-conduct when determining due process grants prosecutors a license to corrupt the judicial process and "railroad" defendants at will.

Index of Appendix

Appendix A:	Opinion and Order of the United States Court of Appeals for the 7th Circuit	1a-35a incl.
Appendix B:	Attorney Martin Kinney's Affidavit dated August 28, 1980.	36a -37a
Appendix C:	Attorney Martin Kinney's Rule 33 Affidavit dated April 2, 1980, filed in District Court.	38a-42a incl.
Appendix D:	Fifth Amendment, United States Constitution	43a
Appendix D:	Sixth Amendment, United States Constitution	44a
Appendix E:	18 U.S.C. Sec. 3500	46a-50a, incl.
Appendix D:	Rule 33, Federal Rules of Criminal Procedure	44a-45a

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

(Submitted: October 19, 1982) *

November 18, 1982

UNPUBLISHED ORDER NOT TO BE CITED PER CIRCUIT FULE 35

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

UNITED STATES OF AMERICA Plaintiff-Appellee,	Appeal from the United States District Court for the Northern District of Indiana
NO. 80-2147 THOMAS R. FADELL Defendant-Appellant.	No. 77-CR-59 PHIL M. McNAGNY, JR. Judge

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument" See Rule 34(a), Fed. R. App. P.;

Circuit Rule 14(f). Having considered the appellant's statement in this case, the appeal has been submitted on the brief and record.

O R D E R

The defendant-appellant, Thomas R. Fadell, appeals the denial of his motion for a new trial brought pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Fadell, formerly the Assessor of Calumet Township, Indiana, was convicted by a jury in 1977 of five counts of obstructing justice and one count of perjury.[1/] The charges against Fadell arose out of his efforts to impede a federal grand jury investigation into possible criminal tax violations. On direct appeal of his conviction to this

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1/ As noted in the district court's order at 1 n. 1 (reproduced in Appendix A), Fadell also was convicted of state charges arising out of the same events underlying his federal conviction.

Court, Fadell presented twenty-two grounds for reversal. We affirmed in an unpublished order after considering (but without discussing most of) them. United States v. Fadell, 601 F. 2d 599 (7th Cir.) (unpublished order), cert. denied, 444 U.S. 915 (1979).

The principle grounds for relief presented in the Rule 33 motion and in the instant appeal are that the Government violated the Jencks Act, 18 U.S.C. § 3500, and Fadell's right to Due Process under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, United States v. Agurs, 427 U.S. 96 (1976). Fadell also argues that the Government knowingly used perjured testimony at trial and that the district court, in ruling on his Rule 33 motion, should have considered the results of the post-trial polygraph examination of the defendant. Finally he maintains that the trial court provided an inadequate evidentiary hearing and took an

inordinate amount of time to decide the instant motion. We affirm.

The district court's order denying Fadell's motion is incorporated and attached as Appendix A of this order. The Court's disposition of Fadell's Rule 33 motion depends substantially upon factual determinations and upon credibility determinations which were made after the evidentiary hearing. Fadell has failed on appeal to present persuasive reasons for rejecting either the trial court's findings of fact or its legal conclusions. We accordingly adopt the district court's order, which adequately disposes of all of the issues raised in the instant appeal except for Fadell's challenges to the trial court's handling of the motion itself.

Fadell's claim that the trial court provided an inadequate hearing on his motion re-

quires little discussion. The hearing originally was scheduled for one day, but ultimately the court allowed an additional two and a half hours. Also, although the court denied a continuance to allow Fadell to present still more testimony, it did grant Fadell permission to submit further written material and documentary evidence. Fadell was thus provided an adequate opportunity to present evidence and arguments in support of his motion.

Fadell also argues that the trial court took an inordinate amount of time to decide his motion after the hearing had concluded. In light of our conclusion that the motion was properly denied, it is unclear how this delay could have prejudiced Fadell. Moreover, considering the extensive nature of the trial and the hearing records, as well as the additional material submitted by Fadell after the hearing, the trial court's order,

which carefully analyzed the many factual and legal issues presented by Fadell's motion, was produced in a reasonable amount of time.

Accordingly, the judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
V.	)	H CR 77-59
	)	
THOMAS R. FADELL	)	

ORDER

This matter comes before the Court on defendant's motion for a new trial. Defendant claims that evidence not available at trial has been newly discovered. He brings his motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure. A hearing was held on the motion on March 28 and 31 of 1980.

Defendant was convicted in this Court of five counts of obstruction of justice and one count of perjury.[1/] On direct appeal, the United States Court of Appeals for the Seventh Circuit affirmed in an

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1/ Defendant has also since been convicted of state charges arising out of the same events underlying his federal conviction.

unpublished order issued June 4, 1979 (Appeal No. 78-1186). The United States Supreme Court denied certiorari on October 15, 1979. ____ U.S. ____, 100 S. Ct. 229, 62 L.Ed.2d 169 (1979).

The principal stated ground for defendant's Rule 33 motion is the availability of alleged newly discovered evidence. In the course of proceedings on this question, however, defendant constantly sought purportedly undisclosed Jencks Act materials, and it became clear that the defendant was also seeking a new trial because of alleged breach by the prosecutors of their duties under the Jencks Act. In his February 22, 1980, filing, defendant also alleged that the constitutional rights accorded him by United States v. Brady, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1973), were violated. Finally, in his September 17, 1979 supplement to the Rule 33 motion the

defendant claims that due process requires a new trial because one of his witnesses, Marie Samar, was not granted immunity with respect to her trial testimony. Defendant's contentions will be discussed seriatim.

I. Newly Discovered Evidence.

A motion for a new trial based on newly discovered evidence is to be viewed with great caution. United States v. Curran, 465 F.2d 260, 262 (7th Cir. 1972). To succeed on such a motion the defendant must establish

> (1) that the evidence was discovered since the trial; (2) that the evidence could not have been discovered earlier with the exercise of due diligence; (3) that the evidence is not merely cumulative or impeaching; and (4) that the evidence is so material that it probably would produce a different verdict. United States v. Ellison, 557 F.2d 128, 133 n. 2 (7th Cir. 1977).

United States v. Pappas, 602 F.2d 131, 133 (7th Cir. 1979). The Court will consider what the defendant asserts it "newly discovered evidence" in the order such evidence

was brought to the Court's attention.

A. Marie Samar -- There is no adequate showing of "evidence" from or regarding this individual. Her affidavit accompanies defendant's original Rule 33 motion, filed August 17, 1979, but because Samar exercised her Fifth Amendment privilege and refused to answer questions at the defendant's trial and at the March 1980 hearing, the Court gives this affidavit no weight whatsoever.

B. Polygraph Test -- A report of a post-trial polygraph examination of the defendant accompanies the August 17, 1979 motion. This Court generally does not consider the results of a polygraph examination to be competent evidence, at least where, as here, the examination was not conducted with the agreement of all parties and the results have not been deemed admissible by stipulation. In any case, if defendant intended to rely on this sort of evidence he should have sub-

mitted to a polygraph examination at the time of his trial. The defendant's failure to obtain such evidence before or during his trial demonstrates a lack of due diligence. In addition, it has not been shown, and the Court is entirely unpersuaded, that defendant's polygraph evidence would probably or reasonably have produced an acquittal.

C. "New Evidence that the Indictment was Unconstitutional" -- This point, raised in the August 17, 1979 motion, was further developed at the March 1980 hearing. Because it attacks the constitutionality of the indictment itself, it is irrelevant to the Rule 33 motion.

Furthermore, defendant's assertions are meritless. The Court has reviewed the entire grand jury record and finds no prosecutorial misconduct invalidating the indictment. In

addition, the sufficiency of the evidence underlying an indictment is not open to challenge. Costello v. United States, 356 U.S. 359 (1956); United States v. Fried; 576 F.2d 787 (9th Cir.), cert. denied, 99 S.Ct. 255 (1978); United States v. Brown, 574 F.2d 1274 (5th Cir.), reh. denied, 578 F.2d 871, cert. denied, 99 S.Ct. 720 (1978).

D. David Krevitz -- The only real evidence from or about this individual that was suitably presented for the purpose of this motion was Krevitz's testimony at the March 1980 hearing, in response to a questions from the Court, that he did not then actually remember the date of a certain telephone conversation he had with the defendant. The deposition transcript on which defendant relies was never put into evidence. In any case it can be given little weight in this

matter because the federal government was not represented at the deposition. In addition, the defendant possessed at the time of his trial a tape recording from which he now claims the date of the conversation might have been inferred, or which might have refreshed Krevitz's recollection at defendant's trial. Thus there has been no newly discovered evidence presented on this point, and the defendant has demonstrated a lack of due diligence with respect to the evidence he sought to elicit from Krevitz.

E. Paul Giorgi -- No evidence, new or old, has been presented by or with respect to this individual.

F. Millard Trivanovich -- Trivanovich's testimony and behavior at the March 1980 hearing, at which he admitted that he knowingly committed perjury at defendant's trial convinces the Court that this individual was not and is not worthy of belief. However,

even fully discounting the trial testimony of Trivanovich, there was more than adequate credible evidence presented at trial with respect to the use of the terms "control card" and "control book" in the Lake County Assessor's Office while it was under the defendant's control. Even after the Court strikes Trivanovich's trial testimony that the defendant had personally used "control card" or "control book" to refer to certain records, there was easily sufficient testimony to establish that the records in question were in fact commonly called by those names by the defendant. Therefore, the defendant has failed to show that the evidence of Trivanovich's recantation would probably have led to an acquittal.

G. John Svaco -- At the March 1980 hearing defendant called Joe Gimenez, who testified that in a January 5, 1979 conversation with Svaco, Svaco stated that he was going to

"get" the defendant and indicated that he had lied at the defendant's federal criminal trial. At the same hearing Svaco denied, under oath, that he had made such statements to Gimenez. The Court, having heard and seen Gimenez testify, specifically finds that he is unworthy of belief. Therefore defendant has failed to meet his burden of proof on this point.

The only other evidence defendant presented from or relating to Svaco was portions of Svaco's testimony at the federal civil trial before this Court, Cause No. H 78-37, of an action based on some of the facts involved in defendant's criminal trial. The Court notices the entire record of H 78-37, however, there is nothing in that record that could possibly justify a new trial in defendant's criminal case.

Although it is entirely unclear from his filings what the defendant hoped to prove with his tape recording of a June 6,

1977 telephone conversation between himself and Svaco, this recording was in the defendant's possession and was admitted into evidence during the criminal trial.[2/] It thus cannot be new evidence.

The exchange cited by the defendant on page seven of his August 17, 1979 motion is not relevant to the issue whether certain records were commonly called "control cards" and it only shows that at the civil trial Svaco did not remember a fact which is irrelevant to any criminal charge.

The several points raised by defendant with respect to Svaco shows, at best, that there were insignificant discrepancies between Svaco's testimony at two different trials. None of these discrepancies would justify a new trial.

Although other matters concerning Svaco are mentioned in defendant's September 17, 1979 supplement to his Rule 33 motion,

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2/ Trial transcript, at 2196, et seq.

no evidence was produced to support those allegations.

H. Helen Kravas -- Although this individual is discussed in defendant's February 4, 1980 supplement to his Rule 33 motion, no evidence, new or old, has been presented regarding those allegations.

I. Danny Gligor -- Although Gligor is discussed in defendant's February 6, 1980 supplement to his Rule 33 motion, no evidence, new or old, has been presented regarding those allegations.

Because defendant has entirely failed to make the showing required in Pappas, supra, it is ORDERED that defendant's Rule 33 motion, insofar as it is based on newly discovered evidence, be, and hereby is, DENIED.

II. Nondisclosure of §3500 Material and of Brady Material.

Defendant also seeks to bring under

the segis of his Rule 33 motion his claim that the government prosecutors abridged duties imposed upon them by the Jencks Act, 18 U.S.C. §3500, and by United States v. Brady, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963), so as to required the granting of a new trial. A motion for a new trial based on any ground other than newly discovered evidence must be made within seven (7) days after a verdict or a finding of guilty or within such further time as the Court may fix during the seven-day period. Fed.R.Crim.P. 33. Although defendant's claims pertaining to §3500 material and to Brady material cannot now be brought before the Court by means of the Rule 33 motion, the Court will consider the claims as part of the Rule 33 motion and will speak to defendant's arguments so that it will be clearly demonstrated that the claims are absolutely without support.

In five particulars, defendant claims that he did not receive §3500 material as required by statute. First, defendant insists that §3500 material relevant to the trial testimony of Frank Kaffenberger was never produced. Frank Kaffenberger, an agent with the Internal Revenue Service, appeared for the government as a witness in their case in chief only to establish a chain of custody of certain evidence. He was later called as a rebuttal witness. In fact, as was made apparent as the evidentiary hearing, the government offered to turn over the Kaffenberger §3500 material Defendant's attorney, Mr. Martin Kinney, declined to accept the material indicating that the defense did not want it. Where a defendant knowingly rejects the tender of §3500 material, he cannot be later permitted to torpedo a federal conviction by claiming that those rights guaranteed him by 18 U.S.C.

§3500 have been trampled. United States v. Falk, 605 F.2d 1005, 1013, 1014 (7th Cir. 1979); United States v. Carter, 613 F.2d 256, 261 (10th cir. 1979); United States v. Bullock, 551 F. 2d 1377, 1384 (5th Cir. 1977).

In addition, the Court has read each of the documents that defendant insists would constitute part of the §3500 material relevant to Kaffenberger's testimony. Nowhere in any of the documents is there anything that would raise a reasonable doubt as to the propriety of defendant's conviction. Even if defendant had not waived his right to the Kaffenberger materials, retention of the documents by the government would constitute harmless error. Overwhelming evidence of defendant's guilt was adduced at trial totally apart from Kaffenberger's testimony. United States v. Batchelder, 581 F.2d 626, 635 (7th Cir. 1978), rev'd on other grounds, 442. U.S. 114, 99 S.Ct. 2198, 60 L. Ed. 2d 755 (1979).

Second, defendant asserts that §3500 material relevant to the testimony of John Svaco was existent and was never disclosed to him. Svaco testified against defendant at trial. Defendant alludes in particular to a document embodying the substance of "an interview made by government agents with John Svaco at the office of Attorney Max Cohen." The only portion of the memorandum of that interview that defendant's attorney by affidavit stated he did not received from the government was "the first 6-1/2 type-written pages."

Testimony at the evidentiary hearing of Agent Kaffenberger, Attorney Kinney, and Richard Hanning, a federal prosecutor, indicated that the initial part of the "interview" to which defendant refers involved only Attorney Cohen and the federal agent. Svaco apparently arrived later and then joined in the conversation. Material re-flecting those assertions of Attorney Cohen

made prior to the time when Svaco entered into the discussion are of course not §3500 material. The Court understands, moreover, that a transcript of the entire conversation was eventually turned over to Mr. Kinney at trial.

Section 3500(e)(1) of Title 18 of the United States Code provides:

> The term "statement" as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States means --
>
> > (1) a written statement made by said witness and signed or otherwise adopted or approved by him;
> > (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement, or
> > (3) a statement, however, taken or recorded, or a transript thereof, if any, made by said witness to a grand jury.

It is the burden of the defendant to specify with reasonable particularity that a certain

document exists, that there is a reason to believe that the document is a statutory "statement", and that the government failed to provide it in violation of the Jencks Act. United States v. Robinson, 585 F.2d 274, 280, 281 (7th Cir 1978), cert. denied, 441 U.S. 947, 99 S.Ct. 2171, 60 L.Ed.2d 1051 (1979). Defendant has failed to satisfy his burden of proof. Defendant has not demonstrated that the entirety of the discussion held at Attorney Cohen's office occurred with Svaco present. A finding that the first 6-1/2 pages of the memorandum reflecting the conversation at Attorney Cohen's office was §3500 material is therefore unwarranted.

Defendant also alleges that federal agents met on other occasions with Svaco on which occasions Svaco made certain assertions. These purported assertions, defendant alleges, were never disclosed to him

and constituted §3500 material. Again, defendant has failed to meet the burden of proof recognized in Batchelder. Neither does defendant demonstrate as it is required by United States v. Mackey, 571 F. 2d 376, 389, 390 (7th Cir. 1977), of those defendants who would press arguments of §3500 violations, that the alleged statements made by Svaco on these other occasions related to the events and activities to which Svaco testified at trial. Moreover, Agent Kaffenberger testified at the evidentiary hearing that the government offered to defendant all §3500 material generated as a result of conversations federal agents had with Svaco.[3/]

The testimony of Agent Kaffenberger conflicts with the assertions defendant makes

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3/ Transcript of evidentiary hearing, at 195, 201, 213. Indeed, Kaffenberger testified that all §3500 material had been disclosed to defendant. Transcript of evidentiary hearing, at 213.

by way of motion. Agent Kaffenberger is extremely believable. Defendant has appeared before the Court on a number of occasions in both civil and criminal matters. After observing defendant and hearing testimony and argument from him on a number of occasions, the Court is persuaded that it is impossible to conceive of any set of circumstances in which defendant would ever hesitate to lie if his interest was at stake.

The third particular in which defendant alleges that the government failed to disclose §3500 material as required by the Jencks Act pertains to the testimony of Millard Trivanovich. Defendant asserts that Trivanovich stated that he was interviewed on about five different occasions by either Internal Revenue Service agents or federal prosecutors. Defendant also asserts that notes were made of these alleged

interviews, that these notes constituted §3500 material, and that the notes were never turned over to him. At the evidentiary hearing Trivanovich while under oath recanted the testimony he had given at defendant's criminal trial. By so doing Trivanovich succeeded only in achieving the same level of credibility before the Court that defendant has achieved. The veracity of what Trivanovich says cannot be assumed. Defendant's allegations of the non-disclosure of alleged §3500 material materials pertaining to testimony of Trivanovich are without support. Failing to meet the Batchelder burden, defendant's naked assertions are not sufficient to warrant a finding that the government breached its duty.

In a supplement to the Rule 33 motion filed February 4, 1980, defendant asserts as a fourth alleged violation of his §3500 rights that the government obtained

and did not disclose to him notes that Helen Kravas had made of a conversation she had held with defendant on January 7, 1977. Helen Kravas testified against the defendant during his federal trial. The Court need not comment on whether defendant has brought sufficient evidence to bear in support of his allegation. The trial transcript reflects that when Mrs. Kravas took the stand, she had with her in the courtroom the notes she had made of the January 7, 1977 conversation with defendant.[4/] If the defendant had asked then to inspect the notes, he could have done so. Defendant then was entitled to have the writing produced, to inspect it, to cross-examine Mrs. Kravas thereon, and to introduce into evidence those portions which related to the testimony of the witness. Fed.R.Evid. 612. Choosing

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4/ Trial transcript, at 456.

for whatever reason not to look at the notes then, defendant cannot now be heard to complain. United States v. Falk, 605 F.2d at 1013, 1014; United States v. Carter, 613 F. 2d at 261; United States v. Bullock, 551 F. 2d at 1384. Assuming defendant had a right to view the notes, he waived the right.

Fifth, defendant in sweeping language filed February 22, 1980 insists that the government possessed transcripts or materials reflecting statements made to a grand jury by a number of government trial witnesses not already mentioned, and the government refused to disclose the statements to defendant. David Krevitz, John Irak, Robert Moise, Bobby Carter, Bernard Konrady, Derek Parks, and Millard Trivanovich, the defendant alleges, all made statements the government failed to disclose in violation of the Jencks Act.[5/]

5/ At the evidentiary hearing, defendant changed his position and admitted that the government had furnished him Derek Parks' §3500 grand jury material. Transcript of the evidentiary hearing of March 28, 1980, at 11, 12.

Before the Court will permit defendant to be tried anew, defendant must satisfy his proof burden as identified in United States v. Robinson, 585 F.2d at 280, 281. Against defendant's assertion that he never received §3500 grand jury material for Krevitz, Irak, Moise, Carter, and Konrady, and that he did not receive all the grand jury testimony of Trivanovich, must be weighed the assertions of the federal prosecutors and of Agent Kaffenberger. The government prosecutor by filing of February 1, 1980 indicated that all grand jury material covered by 18 U.S.C. §3500 for each of Krevitz, Irak, Moise, Carter, Konrady, and Trivanovich was disclosed to defendant.[6/] At the evidentiary hearing a federal prosecutor, Richard Hanning,

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6/ In fact, the government represented that the grand jury material covered by 18 U.S.C. §3500 with respect to every grand jury witness called as a witness by the United States at trial was disclosed to the defendant.

testified that Agent Kaffenberger took charge of packaging and keeping track of the §3500 material. Agent Kaffenberger at the evidentiary hearing testified under oath that all §3500 grand jury material with the exception of his own was turned over to defendant.7/

Defendant has not met his proof burden. Against the representations of the federal prosecutor and Agent Kaffenberger that §3500 grand jury material was disclosed, the Court weighs the bald assertions of defendant, one whose conviction of perjury has been affirmed on appeal.

Finally, by filing of February 22, 1980, defendant alleges that the government failed to disclose to him materials in their custody as mandated by Brady v. Maryland, 373

7/ Transcript of evidentiary hearing of March 28, 1980, at 214. As noted earlier, Kaffenberger's §3500 material was offered to defendant and refused.

U.S. 83, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963). Brady recognized that the prosecution in a federal criminal cause is constitutionally obligated to disclose evidence in its possession that would be material to the defense of the accused. The nature of the prosecution's obligation wsa not specifically identified until United States v. Agurs, 472 U.S. 97, 96 S.Ct. 2292, 49 L.Ed.2d 342 (1976) was decided. As announced in Agurs, the obligation of the prosecution varies depending on the factual setting. Where the prosecution fails to disclose evidence demonstrating that its case includes perjured testimony, a conviction must be set aside if there "is any reasonable likelihood that the false testimony could have affected the judgment of the jury." 472 U.S. at 103. Where the defense makes no specific request for undisclosed material or makes only a general request, a

conviction cannot be permitted to stand only if "the omitted evidence creates a reasonable doubt that did not exist." 427 U.S. at 112. Finally, where the defense specifically requests certain evidence of the prosecution, a lesser showing of materiality than that required in the case of a general request is required. 472 U.S. at 106

The Court has read the materials in the government's possession pertaining to defendant's conviction in their entirety. An evidentiary hearing was held over the course of two days at which the testimony of myriad witnesses was heard. The court had exhaustively investigated the assertions of defendant and finds nothing that would warrant the conclusion that federal rights guaranteed defendant by either 18 U.S.C. §3500 or United States v. Brady have been violated.

As the trial transcript reflects, defendant was a miserably corrupt and venal public

official who by bullying, coercion, and plain meanness insisted that public employees within his fiefdom labor for him in his own private businesses. The record shows that he tape recorded a great number of significant conversations he held with individuals working within his domain without their knowledge, that he did all he could to hinder an investigation by the Indiana State Board of Accounts of the fashion in which he discharged his duties as Calumet Township Assessor, and that when the truth began to come out he went so far as to obstruct justice and perjure himself in an attempt to avoid the punishment he deserved. That defendant would make absolutely unsupported allegations of government non-disclosure of §3500 material and of Brady material therefore is certainly no surprise.

The Court therefore FURTHER ORDERS that defendant's motion for a new trial, to the

extent that it rests on alleged violations of 18 U.S. §3500 and United States v. Brady, is DENIED.

III. Other Contentions.

Finally thoughout recent filings and proceedings in this case defendant has consistently urged that the federal prosecutors were guilty of heinous misconduct. While the prosecutors might have been more careful about handling Jencks Act material, there is nothing in the record indicating any prosecutorial misconduct, such as knowingly using false testimony, which might call for a new trial. Nor was the failure of the government to grant immunity to Marie Samar a denial of defendant's due process rights. Therefore, it is FURTHER ORDERED that insofar as the defendant's Rule 33 motion rests on the above grounds, it is also DENIED.

The Court, being fully advised in the premises, hereby DENIES defendant's motion

for a new trial. The Court therefore ORDERS and ADJUDGES that defendant's motion for a new trial shall be DENIED.

Enter: July 18, 1980.

/S/ Phil M. McNagny, Jr.
Judge, United States District Court

A F F I D A V I T

STATE OF INDIANA)
SS:
COUNTY OF LAKE)

MARTIN H. KINNEY being first duly sworn upon his oath deposes and says: That he was the attorney for Thomas R. Fadell in Cause No. HCr. 77-59 in the United States District Court in Hammond, Indiana.

During the trial of said cause, the Government attorneys agreed to furnish me with 3500 material prior to the testimony of each witness. Agent Frank Kaffenberger testified for the Government on two occasions. The first time, as part of the Government's case in chief in regard to the custody of certain exhibits and the second time, in rebuttal. To my recollection on neither occasion was I offered any 3500 material concerning this witness, and I did not knowingly waive any 3500 material concering this

witness.

/S/ MARTIN H. KINNEY
Martin H. Kinney

Subscribed and sworn to before me this 28th day of August, 1980.

/S/ ROSE MEHOS
Rose Mehos, Notary Public

My commission expires:
January 13, 1984

Appendix B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA	)	
	)	
VS.	)	No. H CR 77-59
	)	
THOMAS R. FADELL	)	

A F F I D A V I T

MARTIN H. KINNEY being first duly sworn upon his oath deposes and says: That he is an attorney practicing in Lake County, Indiana, with offices at 500 East 86th Avenue, Merrillville, Indiana. That he represented the defendant Thomas R. Fadell, as trial counsel during the trial of the above captioned matter. That as a result of certain post trial motions having been filed in the above captioned matter, he has examined the documents contained in Defendant's Exhibits M and N which were supplied to Mr. Fadell by the Government. The documents contained

in defendant's Exhibits M and N are enclosed in two brown, legal file folders entitled "Witnesses - Fadell 3500 Material".

As to Defendant's Exhibit M, your affiant has examined the contents of the various witness files and he has no recollection of having turned over to him, during the trial, the following documents which pertain to the following witnesses:

As to John Svaco:

The first 6½ typewritten pages of an interview with John Svaco at Attorney Max Cohen's office dated September 13, 1976, contained in what is marked as "Government's Exhibit 2".

6 typewritten memorandums concerning phone conversations with John Svaco dated May 21, May 23, May 24, May 31, June 1 and June 2, all in the year 1977.

11 pages of handwritten notes entitled "Second Interview with Svaco".

2 typewritten pages on Post Tribune stationery concerning statements made by Svaco to Bob McClure.

8 pages handwritten notes entitled "John Svaco 7:00 P.M." at the top.

28 pages handwritten notes with "John, Paul and Frank 2 o'clock P.M." on top.

2 pages handwritten notes dated May 21, 1977 entitled "Memorandum of Interview"

3 pages handwritten notes entitled "John" at the top, dated November 24, 1976.

As to the witness, Helen Kravas:

4 pages handwritten notes with "U.S. Steel Raw Materials" printed on the first page.

5 pages handwritten notes "Helen Kravas" and "8 o'clock" at the top.

12 pages handwritten notes "Helen Kravas, 8:00 P.M." at the top.

As to witness Robert Carter:

8½ pages handwritten notes with "Bobby Carter, 7:30 P.M." at the top.

As to witness Bart Kusmierz:

10½ pages handwritten notes with "Bart Kusmierz, 8:45 P.M." at the top.

As to witness George Chacharis:

8 pages handwritten notes entitled in the first page, "George Chacharis" dated October 5, 1977".

As to William Covey:

19 pages handwritten notes with "Bill C" on top, "6:55 P.M."

As to the Defendant's Exhibit N, your affiant has examined the contents of the various witness files and he has no recollection of having turned over to him during the trial, the following documents which pertain to the following witnesses:

As to witness Eli Ivancevich:

5 handwritten pages

As to witness John Irak:

3 handwritten pages entitled "Pay-offs".

2 handwritten pages without title.

As to witness David Krevitz:

Handwritten letter to Bob McClure.

16 pages handwritten notes dated June 20, 1977.

3 pages handwritten notes dated June 20, 1977.

As to witness John Nauta:

6 pages handwritten notes.

As to witness Michael Katz:

3 pages, 1 typed, 2 handwritten.

As to witness Dozier Allen:

Memorandum of interview dated May 18, 1977.

2 pages handwritten material.

As to witness Mike Paulson.

7 pages handwritten notes.

AFFIANT FURTHER SAIETH NOT.

/S/ Martin H. Kinney
Martin H. Kinney

Subscribed and sworn to before me this 2nd day of April, 1980.

/S/ ROSE MEHOS
Rose Mehos, Notary Public

My commission expires:
January 13, 1980
County of resident: Lake

Amendment 5

Constitution of the United States

CRIMINAL ACTIONS--PROVISIONS CONCERNING --DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES--No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use; without just compensation.

Appendix D

Amendment 6 Constitution

AMENDMENT VI--JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 33, Federal Rules of Criminal Procedure

Text of Rule 33

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the

court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

As amended Feb. 28, 1966, eff. July 1, 1966."

18 § 3500

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, as statement or report in the possssion of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement

relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be

preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, amy recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial

shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however, taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

As amended Pub.L. 91-452, Title I, § 102, Oct. 15, 1970, §4 Stat. 926.